Bukit Cerakah Development Sdn Bhd v L'Grande Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–320 OF 2007
GOPAL SRI RAM, JAMES FOONG AND SURIYADI JJCA
22 FEBRUARY 2008

Civil Procedure — Functus officio — Principles of — Architect's certificate — Reference to arbiter — Whether architect excluded from acting because of reference to arbiter – Whether architect functus

Contract — Building contract — Set off — Whether employer and contractor have right of set off against each other in absence of contrary intention expressed by parties

Equity — Equitable remedies and reliefs — Set off — Whether litigant permitted to plead unliquidated sum by way of set off

The appellant, the developer of a project employed the respondent to carry out construction on the two phases of the project. Later, disputes arose between the parties. Two actions were filed by the respondent (the S3 suit was in respect of phase 2 contract and S5 suit was in respect of phase 1 contract). In respect of the S3 suit, the appellant delivered a defence and counterclaim in which it alleged fraud, breach of contract and negligence on the respondent's part. In respect of the S5 suit, the respondent based the claim on interim certificates issued in respect of phase 1. The appellant sought to set off monies owing from the respondent to the appellant on the phase 2 contract against any sum that might be due from the appellant to the respondent under the phase 1 contract. In support of its defence of set off, it relied on cl 50 of the phase 2 contract. The judge on a summons taken out by the respondent under O14A of the Rules of the High Court 1980 held against the appellant. Hence this appeal.

It was contended by the respondent that the right to a set off preserved by cl 50 applied only to monies. The respondent further contended that there were no sums owing from the respondent to the appellant because interim certificate No 14 issued by the superintending officer (SO/the architect) and relied upon by the appellant was as giving rise to a set off was void. It was void because it was issued after the S5 suit was commenced. It was also contended

that the certificate No 14 was not issued bona fide. The appellant argued that the parties intended that the SO in the phase 2 contract was not to be treated as being functus officio despite the parties having taken their dispute to the court. It was contended that it was argued that no issue arose in the present case of an exercise of a concurrent jurisdiction between the SO and the court or arbitrator.

Held, allowing the appeal:

(1) It is a principle of general application that both an employer and a builder has a right of set off against each other in the absence of a contrary intention expressed by the parties. Such a contrary intention may appear from express words used by the parties or by clear implication from what they said or did (see para 6);*Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57.

(2) The words 'shall be entitled to deduct any money owing from the Contractor to the Government' in cl 50 expressly permits a set off in the appellant's favour. Further, the right of set off was not confined to the particular contract, in this case the phase 2 contract, but to use the words of the clause, 'any other contracts' to which the appellant and the respondent were parties. Hence, it must perforce include the phase 1 contract. On this basis, the case should be decided in the appellant's favour (see para 7).

(3) It is not the law that in any circumstance whatsoever an architect is functus officio once a court or an arbitrator is seised of a dispute. It depends very much on the terms of the particular contract under which the employer engaged the builder. In other words, it is a question of construction and not a question of general law as to whether an architect is functus (see para 10).

(4) Clause 49 provides that no certificate of the SO is to be considered as being conclusive evidence as to 'the sufficiency of any work, materials or goods to which it relates'. In other words, all issues were open before an arbitrator or a court of law. Hence, it could not be said that certificate No 14 was void because the architect was functus officio when he issued it (see para 15).

(5) Whether certificate No 14 was issued bona fide or lack of it was a matter to be tried on the facts as established based on the evidence adduced at a full trial of the action. It was not a matter that was fit for summary disposal through the O 14A procedure (see para 16).

(6) The phrase 'any money owning' did not refer to a liquidated sum and thereby limited or restricted the appellant's right only to a set off at law. If the parties wanted to do that they would have had to have been more specific in the use of their language. Hence, the phrase 'any money owning' used by cl 50 did not have the effect of depriving the appellant of its right of equitable set off (see para 17).

(7) Equity has always permitted a litigant to plead an unliquidated sum by way of a set off. On a proper construction of cl 50, the appellant did not actually had to produce a specific and final figure. All he had to do was to quantify his loss in a bona fide way by reasonable means. That he had done. Whether the set off would succeed on merits was a matter that must await the trial of the action (see paras 18 & 20).

[Bahasa Malaysia summary

Perayu, pemaju satu projek telah menggaji responden untuk menjalankan pembinaan di dua fasa projek tersebut. Kemudiannya pertikaian berbangkit di antara kedua pihak. Dua tindakan telah difailkan oleh responden (tindakan S3 berhubung dengan kontrak fasa 2 dan tindakan S5 berhubung dengan kontrak fasa 1). Berhubungan dengan tindakan S3, perayu menyampaikan suatu pembelaan dan tuntutan balas di mana ia mengatakan fraud, kemungkiran kontrak dan kecuaian di pihak responden. Berhubungan dengan tindakan S5, responden berdasarkan tuntutannya di atas sijil-sijil interim yang dikeluarkan berhubungan dengan fasa 1. Perayu menuntut untuk penolakan wang yang dihutang oleh responden kepada perayu atas kontrak fasa 2 dengan sebarang jumlah yang kemungkinan dihutang oleh perayu kepada responden di bawah kontrak fasa 1. Untuk menyokong pembelaannya untuk penolakan, ia bergantung kepada klausa 50 kontrak fasa 2. Dalam satu saman yang dikeluarkan oleh responden di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980, hakim telah memutuskan terhadap perayu. Maka rayuan ini.

Ia dihujahkan oleh responden bahawa hak untuk penolakan yang dikekalkan oleh klausa 50 hanya untuk wang. Responden selanjutnya berhujah bahawa tiada jumlah yang dihutang oleh responden kepada perayu oleh kerana sijil interim No 14 yang dikeluarkan oleh pegawai penguasa (PP/arkitek) dan digunakan oleh perayu sebagai memberi hak untuk penolakan adalah terbatal. Ia dihujahkan bahawa ia adalah terbatal oleh kerana ia dikeluarkan selepas tindakan S5 dimulakan. Ia juga dihujahkan bahawa sijil No 14 tidak bona fide dikeluarkan. Perayu berhujah bahawa pihak-pihak berhasrat bahawa PP di dalam kontrak fasa 2 tidak boleh dianggap sebagai functus officio walaupun pihak-pihak telah membawa pertikaian mereka ke mahkamah. Ia dihujahkan bahawa tiada isu yang berbangkit dalam kes ini mengenai satu penggunaan bidang kuasa serentak di antara PP dan mahkamah atau penimbangtara.

Diputuskan, membenarkan rayuan:

(1) Ia adalah satu prinsip am yang dipakai bahawa kedua-dua majikan dan pembina mempunyai satu hak penolakan terhadap satu sama lain jika tiada satu niat bertentangan dinyatakan oleh kedua pihak. Niat bertentangan ini mungkin terdapat daripada perkataan-perkataan nyata yang digunakan oleh kedua pihak ataupun melalui implikasi yang jelas daripada apa yang mereka katakan atau lakukan (lihat perenggan 6); *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57.

(2) Perkataan-perkataan 'shall be entitled to deduct any money owing from the Contractor to the Government' di dalam klausa 50 secara jelas membenarkan penolakan bagi pihak perayu. Selanjutnya, hak untuk penolakan tidak terangkum kepada kontrak tertentu, dalam kes ini kontrak fasa 2, tetapi untuk menggunakan perkataan-perkataan klausa 'any other contracts' yang mana perayu dan responden adalah pihak-pihak. Maka, ia mesti memasukkan kontrak fasa 1. Atas dasar ini, kes ini patut diputuskan berpihak kepada perayu (lihat perenggan 7).

(3) Ia bukanlah undang-undang dalam keadaan apa sekali pun bahawa seorang arkitek adalah functus officio apabila mahkamah atau penimbangtara mempunyai bidang kuasa ke atas sesuatu pertikaian. Ia bergantung sepenuhnya kepada terma-terma sesuatu kontrak yang mana majikan menggaji pembina tersebut. Dalam perkataan lain, ia adalah satu persoalan tafsiran dan bukan persoalan undang-undang am sama ada seseorang arkitek adalah functus (lihat perenggan 10).

(4) Klausa 49 memperuntukkan bahawa tiada sijil yang dikeluarkan oleh PP dianggap sebagai bukti muktamad akan 'the sufficiency of any work, materials or goods to which it relates'. Dalam perkataan lain, segala isu-isu adalah terbuka di hadapan seorang penimbangtara ataupun mahkamah. Dengan itu, ia tidak boleh dikatakan bahawa sijil No 14 adalah terbatal oleh kerana arkitek yang mengeluarkannya telah functus officio apabila ia mengeluarkannya (lihat perenggan 15).

(5) Sama ada ada sijil No 14 dikeluarkan bona fide atau tidak ia adalah satu perkara yang perlu dibicarakan atas fakta-fakta yang dibuktikan melalui keterangan yang dikemukakan di perbicaraan penuh tindakan tersebut. Ia bukannya satu perkara yang sesuai untuk ditolak terus melalui prosedur A 14A (lihat perenggan 16).

(6) Frasa 'any money owning' tidak merujuk kepada satu jumlah yang tak menentu dan dengan itu menghad atau menghalang hak perayu hanya kepada satu tolakan di sisi undang-undang. Sekiranya pihak-pihak hendak melakukan perkara tersebut, mereka perlu lebih spesifik dalam penggunaan bahasa mereka. Dengan itu frasa 'any money owning' yang

digunakan oleh klausa 50 tidak mempunyai kesan mengkilankan perayu akan hak ekuitinya untuk tolakan (lihat perenggan 17).

(7) Ekuiti sentiasa membenarkan seseorang litigan memplidkan satu jumlah tak tertentu melalui tolakan. Melalui satu tafsiran yang wajar klausa 50, perayu sebenarnya tidak perlu mengemukakan satu jumlah yang spesifik dan muktamad. Apa yang perlu dilakukannya ialah mengirakan kerugiannya secara bona fide melalui cara yang munasabah. Ini telah dilakukannya. Sama ada tolakan tersebut akan berjaya atas merit adalah satu perkara yang akan diputuskan semasa perbicaraan tindakan tersebut (lihat perenggan 18 & 20).]

Notes

For a case on principles of functus officio, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2833.

For cases on set off in equity, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2654–2655.

For cases on set off in building contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2900–2905.

Cases referred to

Federal Commerce and Navigation Co v Molena Alpha Inc (The Nanfri) [1978] QB 927 (refd)

GA Group Ltd v Scottish Metropolitan Property Plc (1992) Inner House (folld)

Hiap Tian Soon Construction Pte Ltd & Anor v Hola Development Pte Ltd & Anor [2003] 1 SLR 667 (refd)

JA Milestone & Sons Ltd (In Liquidation) v Yates Castle Brewery [1938] 2 KBD 439 (distd)

L'Grande Development Sdn Bhd v Bukit Cerakah Development Sdn Bhd [2007] 4 MLJ 518 (refd)

Morgan & Son, Ltd v Martin Johnson Ltd [1949] 1 KB 107 (refd)

Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor [1995] 3 SLR 1 (refd)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)

Piggott v Williams (1821) 56 ER 1027 (refd)

Legislation referred to

Rules of the High Court 1980 O 14A

Appeal from: Civil No D8(S5)–22–241 of 2000 (High Court, Kuala Lumpur)

CK Yeoh (Jason Chan with him) (Ranjit Ooi & Robert Low) for the appellant.

Rajendra Navatnam (Wong Hin Loong with him) (Azman Davidson & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal turns upon the construction of a clause in a standard form PWD (JKR) contract in its application to the facts that are relevant to this dispute. I will refer to the clause in question at some length later. Let me first set out the facts and background against which this appeal rests.

[2] There is a project called the Puncak Alam Development. The appellant is the developer of that project. The project comes in two phases. It employed the respondent to carry out construction of both phases. Phase 2 was to consist of 331 units of double storied terrace houses. A letter of award was issued by the appellant to the respondent in respect of Phase 2 on 15 November 1998. Later a contract in the PWD form was executed by the parties.

[3] In point of time Phase 1 came after Phase 2. It was to comprise of 16 blocks of single storied terrace houses. The letter of award in respect of Phase 1 was issued on 5 July 1999. A second standard contract in PWD form was entered into between the parties.

[4] Later, disputes arose between the parties. Two actions were filed. Both by the respondent. I will call them the S3 and S5 suits. Because they were filed in the third and fifth courts respectively of the Civil Division of the Kuala Lumpur High Court. The S3 suit was in respect of Phase 2. In it the respondent claimed a sum of RM5,862,612.33 as being due under interim certificates issued for work done on Phase 2 of the project. The appellant delivered a defence and counterclaim in which it alleged fraud, breach of contract and negligence on the respondent's part. In its counterclaim it claimed a sum of RM46,210,924.68 on the ground that 243 out of the 331 units lacked structural integrity and had therefore to be demolished. It relied on interim certificate 14 issued by the superintending officer, that is to say, the architect in the present case.

[5] The S5 suit was commenced by the respondent to recover a sum of RM3,665,582.94 that was claimed to be due on interim certificates issued in respect of Phase 1. The appellant delivered its defence and counterclaim to the S5 suit. Among other pleas taken, the appellant sought to set off monies owing from the respondent to the appellant on the Phase 2 contract against any sum that may be due from the appellant to the respondent under the Phase 1 contract. In support of its defence of set off, it relied on cl 50 of the Phase 2 contract. The question is whether it could do so. The judge on a

summons taken out by the respondent under O 14A of Rules of the High Court 1980 ('the RHC') held against the appellant. His judgment is reported in *L'Grande Development Sdn Bhd v Bukit Cerakah Development Sdn Bhd* [2007] 4 MLJ 518. The appellant has appealed to us against that decision.

[6] The starting point is the general law regarding the defence of set off in the context of a building contract. It is a principle of general application that both an employer and a builder have a right of set off against each other in the absence of a contrary intention expressed by the parties. Such a contrary intention may appear from express words used by the parties or by clear implication from what they said or did. See, *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57. Next, I turn to examine cl 50 to see if it either expressly or by clear implication excludes the right to a set off provided by the general law. This is what the clause says:

> The Government or the SO on its behalf shall be entitled to deduct any money owing from the Contractor to the Government under this Contract from any sum which may become due or is payable to the Contractor under this Contract or any other contracts to which the Government and the Contractor are parties thereto. The SO in issuing any certificate under Clause 47, shall have regard to any such sum so chargeable against the Contractor, provided always that this provision shall not affect any other remedy to which the Government may be entitled for the recovery of such sums.

References in the clause to 'the Government' are, of course, to the appellant employer, while references to the SO or superintending officer are to the architect appointed for the project.

[7] In my judgment, cl 50 expressly permits a set off in the appellant's favour. The words 'shall be entitled to deduct any money owing from the Contractor to the Government' in cl 50 support my conclusion. Further, the right of set off is not confined to the particular contract — in this case the Phase 2 contract — but, to use the words of the clause, 'any other contracts' to which the appellant and the respondent are parties. Hence, it must perforce include the Phase 1 contract. On this basis, the case should be decided in the appellant's favour. But, says the respondent, there are three impediments to this result.

[8] In the first place, it is contended that the right to a set off preserved by cl 50 applies only to monies – to use the language of the clause – 'owing from the Contractor to the Government', that is to say, from the respondent to the appellant. In the present case there are no sums owing from the respondent to the appellant because interim certificate No 14 issued by the SO (the architect) and relied upon by the appellant was as giving rise to a set off is

void. It is void because it was issued after the S5 suit was commenced. In support of this argument the respondent relied on *JA Milestone & Sons Ltd (In Liquidation) v Yates Castle Brewery* [1938] 2 KBD 439 where Singleton J said this:

> A dispute had arisen between the parties, and, on the decision of the Court of Appeal in *Lloyd Bros v Milward*, it was not open to the architect to give further certificates. If he could do so in the present case, he would be determining the very point on which the dispute had arisen. He would indeed be determining a difficult question of law. The parties were at issue. The defendants knew that the plaintiffs' solicitors were about to issue a writ, and, on the very day on which the writ was issued, the architect gave certificates to some subcontractors, and gave them to others at a later date. I do not consider that those certificates have any effect in law. They cannot be regarded as valid certificates, nor as valid directions to the defendants to pay the subcontractors.

[9] In answer to this argument, the appellant relies on the decision of the Inner House of the Court of Session of Scotland in *GA Group Ltd v Scottish Metropolitan Property Plc* (1992) Inner House Cases. In that case, counsel during argument referred the court to *Milestone v Yates* Lord Coulsfield (with whom Lord Murray and Lord Penrose agreed) appears to have been unimpressed with that case. For this is the conclusion that he reached on the very point at issue before us:

> In treating the question as being whether the architect was functus officio, the arbiter seems to have adopted an approach put before him by the claimants. It seems to me, however, that that approach may be misleading. As long as the contract continues, the architect remains in office and must, in my view, be entitled and, indeed obliged, to exercise the powers and duties of that office, as the situation requires. It is obvious, for example, that he remains entitled to certify payments to the contractors. The proper questions to ask are, in my view, whether in any particular respect the architect is excluded from acting because of a reference to an arbiter or whether in any such respect he, and his employers, are bound by any decision of the arbiter. The answer to these questions will depend on the particular circumstances, and I doubt if any general statement can properly be made.

[10] With respect, I agree. It is not the law that in any circumstance whatsoever an architect is functus officio once a court or an arbitrator is seised of a dispute. It depends very much on the terms of the particular contract under which the employer engaged the builder. In other words, it is a question of construction and not a question of general law as to whether an architect is functus.

[11] In the present case the position is governed by cll 49, 54(e) and Document G/2-Preliminaries & General Conditions of Contract. Each of these read as follows.

First, cl 49:

> No certificate of the SO under any provision of this Contract shall be considered as conclusive evidence to the sufficiency of any work, materials or goods to which it relates, nor shall it relieve the Contractor from his liability to amend and make good all defects, imperfections, shrinkages, or any other faults whatsoever as provided by this Contract. In any case, no certificate of the SO shall be final and binding in any dispute between the Government and the Contractor if the dispute is brought whether before an arbitrator or in the Courts.

Second, cl 54(e):

> The Arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given in accordance with sub-clause (c) aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

Last, Document G/2-Preliminaries & General Conditions of Contract:

> In relation to Clauses 47(a) and (b) of the Conditions of Contract, the Contractor shall note that all interim valuations made by the Consultant Quantity Surveyor are merely recommendations for payment and toward this end, the Superintending Officer (SO) reserves the right to cause any amendments to be made as the Superintending Officer (SO) deems fit and the date upon which the Superintending Officer (SO) endorses the said recommendation or amended interim valuation shall be held as the date of the Superintending Officer (SO) valuation for the purpose of Clause 47(a). The exercise of this right by the Superintending Officer (SO) shall not entitle the Contractor to any claim for breach of contract, extension of time, loss of profit, expenses, interests and/or the like.

[12] It is submitted by the appellant that the combined effect of these terms of the contract is as follows:

(i) the SO's certificate is not binding and conclusive;

(ii) the arbitrator is entitled to review and revise any certificate issued; and

(iii) the SO has the right to cause any amendments to be made as he deems fit and the date upon which the SO endorses the said recommendation or amended interim valuation shall be held as the date of the SO's valuation for the purpose of cl 47(a).

[13] Upon the foregoing basis, it was argued for the appellant that the parties intended that the SO in the Phase 2 contract was not to be treated as being functus officio despite the parties having taken their dispute to the court. It was argued that unlike *Milestone v Yates* no issue arises in the present case of an exercise of a concurrent jurisdiction between the SO and the court or arbitrator. According to the terms of the contract, the arbitrator, or as in the present case, the court's decision shall prevail. No question arises here as to the determination by the SO of the very point upon which the dispute falls to be determined.

[14] In my judgment there is merit in this argument. Applying what Lord Coulsfield said in the *GA Group* case, the question to be asked is this: does the particular contract exclude the architect from acting because of a reference to an arbiter, be it an arbitrator or the court? If it does then the architect is contractually proscribed from issuing a certificate after the dispute has been referred to an arbitrator or to the court. By issuing his certificate in those circumstances, he purports to exercise a concurrent jurisdiction he does not have. Hence he must be held to be functus officio and his certificate to be invalid. And all this because of what the contract provides.

[15] In our case the contract provides quite the opposite. It says in cl 49 that no certificate of the SO is to be considered as being conclusive evidence as to 'the sufficiency of any work, materials or goods to which it relates'. In other words, all issues are open before an arbitrator or a court of law. Hence, it cannot be said that certificate 14 is void because the architect was functus officio when he issued it. In this respect, *Milestone v Yates* is clearly distinguishable on its facts. The decision of Singleton J is entirely supportable on the peculiar facts of that case. The agreement there was differently constructed and Singleton J quite rightly found that the architect, by issuing his certificate after the dispute had gone to arbitration was purporting to decide the very issue that fail to be decided by the arbitrator. For the reasons already stated, that is not the case here. The first ground of objection accordingly fails.

[16] The second point raised by the respondent in answer to the plea of set off based on certificate No 14 is that the certificate was not issued bona fide. The short answer to this submission is that the bona fides or lack of it is a matter to be tried on the facts as established based on the evidence adduced at a full trial of the action. It is not a matter that is fit for summary disposal through the O 14A procedure.

[17] The respondent's third and final point in opposition to the appeal is this. There is no certificate in the S5 suit certifying that there is a sum to be set off arising out of the S3 suit. As such the pre-requisites of cl 50 are not

A met and as such no set off ought to be permitted. This in my view is really a pleading point. If you examine the defence and counterclaim in the S5 suit, you will see that the appellant has indeed pleaded certificate No 14. And you have cl 50 which permits a deduction against any contract between the same parties. The respondent's further complaint under this head is that no
B liquidated sum has been quantified by the appellant and that this prevents a set off under cl 50 because there is not — in the words of the clause — 'any money owing'. In my judgment, the phrase 'any money owning' does not refer to a liquidated sum and thereby limit or restrict the appellant's right only to a set off at law. If the parties wanted to do that they would have had to have
C been more specific in the use of their language. Hence, in my view, the phrase 'any money owning' employed by cl 50 does not have the effect of depriving the appellant of its right of equitable set off. All that is required to maintain a plea of equitable set off is a cross claim that goes 'directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it
D would be manifestly unjust to allow him to enforce payment without taking into account his cross-claim', per Lord Denning MR in *'The Nanfri'; Federal Commerce and Navigation Co v Molena Alpha Inc* [1978] QB 927.

[18] Equity has always permitted a litigant to plead an unliquidated sum by
E way of a set off. Thus, in *Piggott v Williams* (1821) 56 ER 1027 a solicitor's demand for remuneration was met by a defence of a set off claiming that the work had been negligently done. The set off was for an unliquidated sum. Yet, the court permitted it to remain as part of the defendant's pleaded case. *Piggott v Williams* was approved by the Court of Appeal in *Morgan & Son, Ltd*
F *v Martin Johnson Ltd* [1949] 1 KB 107.

[19] In *Hiap Tian Soon Construction Pte Ltd & Anor v Hola Development Pte Ltd & Anor* [2003] 1 SLR 667, the court was faced with a clause that employed the phrase 'money due'. It was held that the phrase did not exclude
G an equitable set off. Lai Siu Chiu J, after citing the judgment of Thean J in *Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor* [1995] 3 SLR 1 had this to say:

> … all that is required from the party purporting to exercise the right of set-off is
H that he seeks to quantify his loss in a bona fide way by reasonable means. The party does not actually have to produce a specific and final figure, quantified by professional quantity surveyors, contrary to what the first plaintiff suggested. Similarly, the fact that the estimated figure may eventually turn out to be too high or too low is not, in itself, sufficient to preclude a party from relying on set-off as
I a defence.

[20] I think that the same is to be said in this case. On a proper construction of cl 50, the appellant does not actually have to produce a specific and final figure. All he has to do is to quantify his loss in a bona fide

way by reasonable means. That he has done. Whether the set off will succeed on merits is a matter that must await the trial of the action. As such the third ground of opposition raised by the respondent fails.

[21] For the reasons already given I would allow the appeal and set aside the judgment and all orders made by the learned judge. We were informed by counsel during argument that if the appeal is to succeed as it has, then the S5 suit is to be stayed and the S3 suit will proceed to trial. I would therefore make a consequential order in those terms. The costs of this appeal and those incurred in the court below must be paid by the respondent to the appellant. But I would direct that the taxation of the appellant's bills be stayed until after the outcome of the S3 suit. The deposit in court will be refunded to the appellant.

[22] My learned brothers James Foong and Suriyadi JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Sally Kee